BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Reference to the Official Report of the Opinions Delivered in the Courts Below.

The Opinion of the trial Judge, Kirkpatrick, J., overruling the petitioner's motions and directing a remittitur of $2000.00, as far as the petitioner has been able to ascertain, has not been reported. A copy thereof is included, however, in the Record.

The Opinion of the Circuit Court of Appeals, per Goodrich, J., affirming the judgment of the United States District Court, is reported in 137 Fed. 2d, 569.

Concise Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

I. The statutory provision believed to sustain the jurisdiction of this Court is section 240 (a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (28 U. S. C. section 347).

II. The grounds upon which the jurisdiction of this Court is invoked are as follows:

(1) The Circuit Court has decided an important question of local law in a way probably in conflict with the applicable local decisions.

(2) The Circuit Court has decided an important question of federal law which has not been, but should be, settled by this Court.

(3) The Circuit Court has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter.

III. The said judgment of the Circuit Court of Appeals, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, was entered on July 16, 1943. On July 31, 1943, the appellant—the present petitioner—filed a petition for a rehearing, and the said petition was refused by the said court on September 20, 1943.

Concise Statement of the Case Containing All That is Material to the Consideration of the Questions Presented.

A concise statement of the case containing, as the petitioner believes, all that is material to the consideration of the questions presented is set forth in this petition for a writ of certiorari filed in this Court simultaneously with this supporting brief.

Specification of the Assigned Errors Intended to Be Urged.

1. The said Circuit Court of Appeals erred in holding that, under the law of Pennsylvania, a defaulting vendor's mere knowledge of facts which makes special damages foreseeable imposes upon him liability therefor, even though there has been no assumption thereof either express or implied.

2. The said Circuit Court of Appeals erred in construing and limiting the scope of Article 17 of the Government contract so as to exclude therefrom delays resulting from accidental and unanticipated machinery breakdowns.

3. The said Circuit Court of Appeals erred in holding that where, apart from the vendor's default, other, inde-

pendent, causes in no way attributable to him made it impossible for his vendee to make a number of his deliveries in time, the vendor is nevertheless liable for all the penalty incurred by the vendee as a result thereof.

IV. The said Circuit Court of Appeals erred in affirming the judgment of the United States District Court in the present case.

V. The said Circuit Court of Appeals erred in refusing the appellant's petition for a rehearing in the said case.

Argument for Petitioner.

I.

There was no assumption of liability, either express or implied, for any special damages, and thus no basis for any recovery thereof as a matter of law.

The petitioner's claim for $15,326.13, for webbing sold and delivered, was *undisputed.* The respondents, however, sought to meet it with a counter-claim of $22,740.99, as *special damages* sustained in penalties assessed against them by the Government for their late deliveries of leggings, and allegedly caused by the petitioner's late deliveries of the webbing which entered into the manufacture thereof. We respectfully submit that, under the facts as disclosed by the Record, the counter-claim was clearly untenable *as a matter of law;* and that the Court below erred in overruling the petitioner's motion for the dismissal thereof (p. 156a), and in refusing to affirm his 9th point (pp. 353a-354a) for binding instructions in his favor.

It is now well settled that a vendor's liability to respond in *special damages,* for non-delivery or late deliveries, is purely *contractual* and that, unlike ordinary damages which the law exacts automatically and *in invitum,* the obligation to make good the *special damages* sustained by the vendee rests exclusively upon the vendor's *actual assumption or agreement*—express or implied—to that effect. In other words, such an obligation must be shown to have actually been *contemplated* by the parties when the contract was entered into, and to have been *assumed* by the vendor as a part of such contract; otherwise recovery is limited to ordinary damages alone.

This proposition was first laid down by Baron Alderson, in the classic case of

Hadley v. Baxendale, 9 Exch. 341 (1854).

Said he:

> "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect to such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the *usual* course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the *contemplation* of both parties at the time they made the contract, as the probable results of the breach of it";

and was quoted verbatim and approved by the Supreme Court of Pennsylvania in

Fleming v. Beck, 48 Pa. 309 (1865) pp. 312-13.

It was more elaborately re-stated and developed in the later cases, both here and in England, by emphasizing that the *vendor's assent* to be so bound must affirmatively appear; and that the circumstances surrounding the transaction and the vendor's knowledge of the situation must be *such as to clearly warrant* the assumption of such assent. Thus in

Grebert-Borgnis v. Nugent, L. R. 15 Q. B. Div. 85 (1885)

(cited with approval by Holmes, J., in *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U. S. 540, 544) Bowen, J., said:

> "A person can only be held to be responsible for such consequences *as may be reasonably supposed to*

> *be in the contemplation of the parties* at the time of making the contract. * * * Now, how much of the damages claimed may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract *depends in every case upon how much of the real situation of the parties was so disclosed by the purchaser to the vendor* at the time the contract was made, as to render it a *fair inference of fact* that damages of that class *were intended to be recouped* if they were suffered. In the particular instance with which we have to deal, the vendors knew that the vendee had a subcontract which he had made in France, and that the contract with them was made for the purpose of supplying the goods under the subcontract, and *they knew also that there was no market at which the goods could be bought in case they failed to fulfill their contract.* * * * And, further, that *there being no market* into which either the vendee or his subpurchaser could go in order to make good the skins not supplied, the subpurchaser would be in considerable difficulty so that the *natural inference* from such a transaction could only be that the vendee would be obliged in some way to make good the loss which the subpurchaser had suffered."

The same proposition was forcefully enunciated, with his usual and characteristic clarity, by Holmes, J., in

> *Globe Refining Co. v. Landa Cotton Oil Co., ubi* supra (1903).

Said he (ibid. pp. 544-5):

> "We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that *depends on what liability* the defendant fairly may be supposed to have *assumed consciously, or to have warranted the plaintiff reasonably to suppose* that it assumed, when the contract was made.

This point of view is taken by implication in the rule that 'a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.' (*Citing in support thereof* Grebert-Borgins vs. Nugent, supra, and other cases).

* * * * * *

The question arises, then, What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. Messmore v. New York Shot & Lead Co., 40 N. Y. 422. See Sawdon v. Andrew, 30 L. T. N. S. 23. But, in the language quoted, with seeming approbation by Blackburn, J., from Mayne on Damages, 2d ed. 10, in Elbinger Actien-Gesellschafft v. Armstrong, L. R. 9 Q. B. 473, 478, 'it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without *going on to show that he was told that he would be answerable for them, and consented to undertake such a liability.*' Mr. Justice Willes answered this question, so far as it was in his power, in British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499, 500: 'I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for . . . If that (a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival) had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the *mere fact*

> *of knowledge, without more,* would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the *mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances* that he must know that the person he contracts with *reasonably believes that he accepts the contract with the special condition attached to it.'* The last words are quoted and reaffirmed by the same judge in Horne v. Midland R. Co., L. R. 7 C. P. 583, 591; S. C., L. R. S. C. P. 131. See also Benjamin, Sales, 6th Am. ed. Sec. 872."

Similarly, in

Fuerst Bros. Co. v. Polasky, 249 Fed. 447 (1918)

Learned Hand, J., said (ibid. p. 449):

> "The last case (Globe Refining Co. v. Landa etc. Co., supra) is particularly close, holding that even *notice to the seller of the buyer's purposes is not sufficient* to charge him with the loss resulting from their disappointment."

With the principle thus definitely settled that "mere knowledge", or "notice to the seller of the buyer's purposes", "*cannot increase* the liability; [and that] the knowledge must be brought home to the party sought to be charged under *such circumstances* that he must know that the person he contracts with reasonably believes that he *accepts* the contract with the *special condition* attached to it", the question arises: What are the necessary "circumstances", or the facts necessary to "be brought home" to a defendant, to justify the conclusion that he either "assumed *consciously*" or at least "warranted the plaintiff

reasonably to suppose that [he] assumed" the extended liability sought to be enforced against him. Fortunately, the authorities are quite clear on this point. They laid down a number of propositions which it may be well to discuss seriatim with particular reference to the case at bar.

1. *It must be shown that, at the time the contract was entered into,* the vendor *actually knew that there was no available market where the vendee could procure the merchandise in the event of a breach by the vendor.*

This was squarely ruled in

Czarnikow Etc. Co. v. Federal Ref. Co., 255 N. Y. 33 (1930)

which, like in the case at bar, involved a counter-claim by a vendee for special damages as a result of the plaintiff-vendor's late deliveries. Recovery was allowed in the court below, but the judgment was *reversed* on appeal. Said Kellogg, J. (pp. 44, 46):

> "The true distinction seems to be: If besides notice of contemplated resale the defendant (vendor) *also had notice that other goods could not be obtained* to supply the place of those not delivered—then the profits of a resale may be recovered; *if there was no such notice,* it would be held that loss of profits of a resale *was not* within the contemplation of the parties: Sedgwick on Damages, Sec. 162. The cases of Hammond & Co. v. Bussey, 20 Q. B. Div. 79, Delafield v. J. K. Armsby Co., supra (116 N. Y. Sup. 71), and Carleton v. Lombard, Ayres & Co., 149 N. Y. 137, relied upon by Czarnikow, serve but to emphasize the very rule thus stated."

* * * * * *

> "Liability for the special loss incurred by Czarnikow (vendee) may be visited upon Federal (vendor) *only* if it '*knew* that other goods of the kind contracted for could not be obtained by the buyer.' 3 Williston on Contracts, Sec. 1347, supra. The proof *fails to show* that Federal *had such knowledge,* or that, in point of fact, the general sugar market, in August, 1920, was not sufficiently broad to enable Czarnikow to purchase 29,691 bags of refined sugar in order to make replacement of the sugars rejected. If circumstances disabled Czarnikow from making replacement, they were circumstances *which Federal,* when contracting, could not have foreseen."

The same rule was clearly recognized in the Restatement of the Law (contracts, section 330) which seems to have been adopted in Pennsylvania (150 Sup. 343, 346), and which lays down the test of liability (Illustration 9, ibid. p. 514) that the defendant "*knows* that B (the plaintiff) has a sub-contract to supply rails to C [and] that the caps are necessary, *and cannot be obtained elsewhere*".

We respectfully submit, that in the case at bar, the record is absolutely devoid of any evidence that the petitioner "knew that other goods of the kind contracted for could not be obtained by the [respondents] buyer". Indeed, not only does "the proof fail to show that [the petitioner] had such knowledge"—which is *in itself* sufficient to prevent the recovery here sought by the respondents—but it even fails to show that "in point of fact that general [webbing] market was not sufficiently broad to enable [the respondents] to purchase [the necessary quantity of that material] in order to make replacement [of the delayed shipments]". For not only was the respondents' testimony on this point—*and the burden of course was upon them*—vague, evasive and *clearly inconclusive* (vide pp.

107a-110a), but the very contrary thereof was shown by their own witness, Althouse, who testified (pp. 258a-259a) that there were quite a number of legging manufacturers throughout the country—a fact of which the Court may well take judicial notice—all of whom required webbing and must necessarily have had a market where it could be purchased aside from the petitioner.

Be it as it may, however, and assuming for the sake of argument that "in point of fact" there *was no* available market for the purchase of webbing, there clearly was no evidence that, at the time the contract was entered into, the petitioner "*knew* that other goods of the kind contracted for could not be obtained"; and, as pointed out above, *in the absence of affirmative proof of such knowledge*, no legal basis for the recovery of special damages exists.

2. *Mere knowledge by the vendor that the vendee's subcontract carried a penalty, without knowledge as to the amount thereof, or the specific provisions relating thereto, does not warrant any assumption that the former had either "assumed consciously" or had "warranted the* [*latter*] *reasonably to suppose that it assumed" liability in connection therewith.*

While the jury, in answer to the first interrogatory, found that "Krauss, at the time he made his contract with Greenbarg, knew that Greenbarg's contract with the Government provided that Greenbarg's failure to deliver on time would subject him to a penalty", it also found—in its answer to the second interrogatory—that he *did not know even "approximately* the amount and provisions of the penalty clause" (p. 367a).

We respectfully submit, this lack of knowledge—the fact that the parties did not consider it important enough

to indulge in a *more detailed* discussion in relation thereto, or to make any mention thereof in their written contract—clearly precludes—to use the language of Holmes, J., supra, any supposition that the petitioner had either "*assumed consciously* or [had] warranted [Greenbarg] *reasonably to suppose that he assumed*" any liability in connection therewith; and makes the following language of Bowen, J., quoted above from *Grebert-Borgnis v. Nugent,* peculiarly pertinent:—

> "How much of the damages claimed may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract *depends* in every case upon *how much* of the real situation of the parties was *so disclosed* by the purchaser to the vendor at the time the contract was made, *as to render it a fair inference of fact that damages of that class were intended* to be recouped if they were sustained."

A situation *precisely like this* arose in

> *General Elec. Co. v. Camden I. W.,* 239 Pa. 411 (1913),

where the plaintiff sued the defendant for a balance due for motors sold and delivered, and the defendant—like the defendants in the case at bar—claimed in its affidavit of defense, that it had a contract with the Government for those motors, carrying a penalty for delay, that the plaintiff was "acquainted" and "advised" thereof, and that such penalties were deductible from the amount due to the latter. The plaintiff's rule for judgment for the want of a sufficient affidavit of defense was made absolute, and the judgment was affirmed on appeal. Said the Court (ibid. p. 420):

> "It would seem, that it would *not necessarily follow, that the plaintiff is bound* by defendant's liability

for a penalty, because plaintiff was 'acquainted' and 'advised' *of the defendant's liability under its contract with the United States.* It would be natural and usual, if the plaintiff was to be bound by some undertaking of the defendant, that the *details* of such understanding *should be included in the plaintiff's contract with defendant.* The defendant may have assumed all the risks of delays, in consideration of its expected profit from the contract with the United States. It cannot reasonably be predicated from defendant's own undertaking, that the plaintiff *assumed* its risk. It is more reasonable, under all the facts, to conclude that even if there had been some oral agreement on a date not set forth by the defendant, that it was merged in the conditions of the formal written order. Here the 'terms' of the written agreement, conflict with the alleged terms of the oral agreement."

The same proposition—that in order to charge a party with special damages *all the terms* of the contract under which they arise must be *brought home* to him, was recognized in Illustration 11 appended to section 330 of the Restatement of the Law of Contracts (ibid. p. 514). It reads:

> "A contracts to make goods for B, to be delivered by a fixed date, with a provision for *$10. per day liquidated damages in case of delay.* He ships the goods in due season by the C carrier, informing C of *all the terms* of the contract with B. C fails to deliver on time. B pays for the goods, properly withholding the $10. per day. A can get judgment against C for the amount so withheld by B."

Counsel for the appellees contended that, if Krauss had agreed to be liable for the penalties that might be assessed against the latter, as a result of any delay caused by him, the fact that he did not know the amount thereof and the

provisions relating thereto, is immaterial since he could have obtained such information had he chosen to do so. This is quite true, of course, *if there had been such* an agreement, and the sole question involved had related merely to the extent or the condition of the liability thus admittedly assumed. Here, however, we are at the very *threshold* of the inquiry: *Was* there such an agreement or—to paraphrase again the words of Holmes, J., supra—was his knowledge such, and was it brought home to him "under such circumstances that he might be fairly supposed to have assumed consciously, or to have known that Greenbarg reasonably believed that he accepted the contract with that condition—i. e. his duty to make good the penalties—attached to it"? In other words, does the Record support any legitimate *inference* of such an assumption of liability by *implication?* We respectfully submit, as stated before, that, in the light of the authorities discussed above, Krauss's lack of more detailed knowledge, and the failure to make any mention thereof in his written contract, clearly militate against such an inference.

3. *No implied assumption—"conscious" or constructive—of liability for special damages may be inferred where such damages might be out of all proportion to the vendor's possible gain.*

The total price of the 410,000 yards of ⅝ inch webbing, at $3.32 per one hundred yards (p. 332a), was $13,612. The learned trial Judge did not permit Krauss to state what that webbing cost him (p. 190a) and we have thus no specific evidence as to the exact amount of his prospective profit on that deal. It may be fairly assumed, however, that it could not have exceeded 10%, or $1362.00—indeed, as a matter of fact, it was much less. The defendant Green-

barg testified that it required approximately 21 inches of that webbing for one pair of leggings (p. 130a), i. e. that the 410,000 yards of 5/8 inch webbing contracted for would go into the manufacture of approximately 700,000 pairs of leggings, for which the Greenbargs were entitled to receive from the Government—at the rate of $.6199 per pair (p. 302a)—a total of over $432,000.00, and were thus liable to incur a penalty—on the basis of 2/5 of 1% (p. 321a)—of $1728.00—an amount vastly in excess of the Krauss's entire profit—for *a single day's delay.* By the same token, a delay of 10 days—not an *unusual* contingency—would entail a penalty of $17,280.00 thus wiping out not only his profit of $1362 but *his entire investment* as well, and saddling him with an *additional loss of $3668.00.* Under these circumstances—bearing in mind that we are dealing here, *not with an express,* but merely with an "inferred" or "implied" assumption of liability—how could the plaintiff be "*fairly supposed* to have assumed consciously, or to have warranted [Greenbarg] *reasonably to suppose* that he assumed" such a liability? There is obviously no legitimate basis for such a "*supposition*", and thus no ground upon which such an assumption might legally be predicated.

This was precisely the view taken by the Penna. State Supreme Court in.

Fleming v. Beck, supra.

Said Agnew, J. (ibid. p. 312):

> "A very small part of the machinery of a mill or factory may be so essential to its running, that the want of it will stop operations until this part be mended or replaced, causing a large loss by suspension. But who has ever supposed that the blacksmith, millwright, or mechanic who undertakes to repair or replace it, *and*

> *whose compensation may be a few dollars, or even a few cents, is, by his implied contract to do his work in a workmanlike manner, to be held liable for the large losses of being idle? But few men could be found to work at a risk so great for a compensation so inadequate.* But where, by the terms of a special contract or the facts brought into view at the time of his employment, the attention of the party is *called* to the fact *that the risk is to be his,* and he enters upon the duty with this consequence in his mind, he may be held to another measure of compensation."

In the absence of any evidence to the effect that "the attention of [Krauss was specifically] called to the fact that *the risk is to be his*", how could he possibly be saddled therewith?

The learned Circuit Court apparently agreed with the petitioner that no recovery could be had for the special damages claimed by the respondents under the law as here outlined. It was of the opinion, however, that the law of Pennsylvania is different on this point, and that the rule of decision prevailing in this State does not require any implied assumption, but fixes mere foreseeability as the proper criterion of liability. Said the court:

> "The appellant makes the argument that mere *contemplation* of future harm is not sufficient to impose liability for that harm as special damages. There must have been virtually a tacit agreement to assume the risk of whatever harm was foreseeable. *There is some judicial authority for this view* in the highest court of this land. Globe Refining Company v. Landa Cotton Oil Company, 190 U. S. 540 (1903). There is likewise *some support for the view* in the native home of Hadley v. Baxendale. B. C. Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499 (1868); Horne v. The Midland Railway

Company, L. R. 7 C. P. 583 (1872); L. R. 8 C. P. 131 (1873). The merits of this subsequent restriction on Hadley v. Baxendale have been argued at length. 5 Williston on Contracts (1937) sec. 1357; McCormick, The Contemplation Rule as a Limitation Upon Damages for Breach of Contract (1935) 19 Minn. L. Rev. 496, 511 et seq; Bauer, Consequential Damages in Contract (1932) 80 U. of Pa. L. Rev. 687. However, as this Court has said many times since Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938), our duty is to apply state law as we find it *in the state decisions irrespective of what we may regard as its merits.* Pennsylvania decisions have clearly held, we think, that knowledge of facts which makes special damages foreseeable imposes liability therefor".

We respectfully submit, this conclusion, which would thus introduce an inter-jurisdictional *conflict* into the domain of commercial law, where uniformity has always been regarded as essential, is quite unwarranted, and is utterly unsupported by the very cases from Pennsylvania cited in the Circuit Court Opinion. For all of them, following *Hadley v. Baxendale,* emphasize the element of "contemplation of the parties", and *not mere knowledge or foreseeability,* as the basis of liability; and since this phrase, as we have seen, has been consistently interpreted, both here and in England, to imply a *tacit agreement* to assume the risk,*

*As pointed out above, the words "such as may reasonably be supposed to have been in the contemplation of both parties" have been construed in B. C. Saw Mill Co. v. Nettleship and Horne v. Midland R. Co., supra, to mean that "the mere fact of knowledge cannot increase the liability [but that] the knowledge must be brought home to the party sought to be charged under *such circumstances* that he must know that the person he contracts with rea-

there is manifestly no reason for assuming that it was used by the Pennsylvania Supreme Court in a broader or more inclusive sense.

Indeed, the language used by the Pennsylvania Supreme Court in some of those very cases clearly indicates that knowledge or foreseeability alone is not sufficient. Thus in

Raby, Incorporated v. Ward-Meehan Co., 261 Pa. 468,

Frazer, J., said (ibid. p. 472):

> "Damages, however, resulting from particular circumstances connected with the transaction cannot be recovered unless such circumstances were *known* to the defaulting party to the contract *and* (i. e. in *addition* thereto) *were such as may be supposed to have entered into the contemplation of the parties.*"

In *Weaver Coal Co. v. Md. Casualty Co.*, 295 Pa. 486, the Court (ibid. p. 490) stressed, as the controlling feature of the case, the fact that the defendant had *specifically agreed* in its contract "to indemnify plaintiff 'against *any*

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sonably believes that he *accepts the contract with the special condition attached to it*".

The construction placed upon the same phrase by Bowen, J., in Grebert-Borgnis v. Nugent, was that "the real situation of the parties was *so* disclosed by the purchaser to the vendor at the time the contract was made as to render it a *fair inference of fact* that damages of that class were *intended to be recouped* if they were suffered".

All the above was approved by Holmes, J., in Globe Refining Co. v. Landa Cotton Oil Co., supra, who stated that the necessary "*implication* in the rule" enunciated in Hadley v. Baxendale was that recovery of special damages "depends on what liability the defendant fairly may be supposed to have *assumed* consciously, or to have warranted the plaintiff reasonably to suppose that *he assumed,* when the contract was made".

loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract' ''. There was thus more than mere foreseeability involved in that case. There was actually an *express assumption* of liability.

Any doubt as to the necessity of an actual agreement —tacit or express—as a *sine qua non* in Pennsylvania, *is definitely dispelled* by

Fleming v. Beck, supra.

In that case, which was the first to adopt the rule in *Hadley v. Baxendale* as the law of this State (and which was cited with *unreserved* approval in *Pittsburgh Coal Co. v. Foster*, 59 Pa. 365, 370), Agnew, J., emphatically declared (ibid. p. 312) that the mere fact that it is obvious (and therefore *necessarily foreseeable*) that "a very small part of the machinery of a mill or factory may be so essential to its running, that the want of it will stop operations until this part be mended or replaced, *causing a large loss* by suspension", a breach of an undertaking to repair or replace it *will not ipso facto entail liability* for such loss, unless "by the terms of a *special contract* or the facts brought into view at the time of his employment, the attention of the party is *called to the fact that the risk is to be his and he enters upon the duty with this consequence in his mind*". Can any language be clearer than this?

It may not be inappropriate to add that even on the basis of *foreseeability* as the sole criterion of liability, no recovery could be had here, because there was absolutely no evidence that, *at the time the contract was made, Krauss knew that there was no available market* where the Greenbargs could procure the necessary webbing in case he defaulted. For manifestly, if he did not know that fact,—

even if as a matter of fact there was no such market—he could not possibly be said to have *foreseen* the special damages now sought to be recovered from him, and thus no basis for liability exists at all events.

This, as pointed out above, was squarely ruled on ample authority in

Czarnikow Etc. Co. v. Fed. Refining Co., 255 N. Y. 33,

and in the excerpt quoted from *Grebert-Borgnis v. Nugent*, supra.

II.

The respondents' admitted failure to seek relief from the penalties, under Article 17 of the Government contract, disentitled them at all events from recovering from the plaintiff.

Article 17 of the respondents' contract with the Government (pp. 311a-312a) provided, inter alia,—

> "That the contractor *shall not* be charged with liquidated damages or any excess cost when the delay in delivery is *due to unforeseeable causes beyond the control and without the fault or negligence of the* contractor, including, *but not restricted to*, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, *and delays of a subcontractor* due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market, *if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof*, or within such further period as the contracting officer, shall, with the approval of the head of the department or his duly authorized representative, prior to the date

of final settlement of the contract, grant for the giving of such notice. The contracting officer *shall* then ascertain the facts and extent of the delay *and extend* the time for making delivery when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for making delivery shall be final and conclusive on the parties hereto."

Let us briefly analyze this provision. It begins with a clear *fiat* that "the contractor *shall* not—observe the significant use of the *mandatory* 'shall' instead of the mere permissive or discretionary 'may' or 'might'—be charged" with the penalties provided for delay in *either one* of the following two situations:

1. "When the delay is due to unforeseeable causes beyond [the contractor's] control and without [his] fault, including, *but not restricted to,* acts of God" etc.; or

2. When the delay is caused by the contractor's subcontractor, and is likewise "due to *such* causes", i. e., such as are "unforeseeable and beyond his control, and without (his) fault, including, *but not restricted to,* acts of God" etc.

The relief from penalties thus provided for is obtainable, however, *only,* "if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof" or later, if the time for giving such notice had been duly extended.

Once such notice had been given, the procedure to be followed by the contracting officer is clearly defined. He

is required "to ascertain the facts" and, if "in his judgment *the findings of fact* justify" it—here again, observe, it is not a matter of discretion but one depending upon a *quasi-judicial finding* as to whether the factual situation is really as claimed by the contractor—he "*shall* * * * extend the time for making delivery."

It is thus obvious that if the respondents' delay was caused, as they contend, by the delay of their sub-contractor Krauss, and as the latter's delay was due to a breakdown of the weaving machines—a cause clearly "unforeseeable, beyond his control and without his fault or negligence"—"the looms were there, the looms *were sufficient* to produce the required quantities, but somehow or other the machines *broke down* time after time, and replacement parts *were very hard to get* [for] it took *four to six weeks* for delivery from Crompton Knowles or Fletcher works in Philadelphia to replace the parts" (p. 189a)—the Government would *have had* to grant an extension, had the defendants pursued the procedure prescribed, by giving the requisite notice in writing as provided. This, however, the respondents, though fully conversant with those facts (pp. 128a-129a; and pp. 179a-180a), *admittedly failed to do:*

> "Q. Did you make an application in writing for extension of delivery dates as to the first contract, 8350?
>
> A. *We did not* (p. 115a).
>
> Q. Mr. Greenbarg, Mr. Miller asked you whether or not you had taken up in writing with the Government the question of delays on this contract of July 30, and asked for an extension, and *your answer was that you had not?*
>
> A. *That is right.*" (p. 117a);

and, as a result, there was no extension, and the imposition of the penalties followed. Under these circumstances, how could the defendants possibly pass them on to the plaintiff?

> "The rule is that where a party is entitled to the benefit of a contract and *can save himself from a loss arising from a breach of it* at a trifling expense or with reasonable exertions, *it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.*"

Woods, J., in

Warren v. Stoddart, 105 U. S. 224 (1882),

cited with approval in *Chesapeake Ry. Co. v. Kelly,* 241 U. S. 485 (1916), p. 489.

> "Another fundamental rule of like universality, to be coordinated and applied with the foregoing principle, is that there can be no recovery for losses which reasonable efforts of the party injured *might* have prevented. He is under an affirmative duty to use reasonable care and diligence to avoid loss, or to minimize the resulting damage. 8 R. C. L. 442."

Morris, J., in

Weed v. Lyons Petr. Co., 294 Fed. 725 (1923), p. 733,

and affirmed by this Court, on the Opinion of the trial Judge (300 Fed. 1005).

> "If a man breaks a contract with another, that other, *unless it is impossible to do so, must* take steps to fix his damages by going through with his transaction in some other fashion. If he does not do this, the *damage he suffers is attributed to his own act* and not to that of his delinquent obligor. This is the founda-

> tion of the well-known rule requiring a party claiming breach of a contract to minimize his damages by substituted performance. Cf. Warren v. Stoddart, 105 U. S. 224, 229, 26 L. Ed. 1117; The Oregon (C. C. A. 6), 55 F. 666, 674, 675."
>
> Woolsey, J., in
>
> *Cheatham v. Wheeling Etc. Ry. Co.*, 37 Fed. 2d, 593 (1930), p. 598.

In dealing with this phase of the case, the learned Circuit Court readily conceded the principle that if an extension had been legally procurable under that Article, and the requisite steps were not taken by the Greenbargs to procure it, there could be no recovery, but held that Article 17 as a matter of law did not embrace delays due to such causes, and that the Greenbargs were therefore "not required to go through the motions of attempting to avoid damages when *it is certain* that they will prove of no avail". This construction of the language of the Article, we respectfully submit, was clearly erroneous.

The Article provides for three—and *only three*—requisite characteristics of the "causes" embraced therein, 1st that they be "unforeseeable", 2d, "beyond [the contractor's or sub-contractor's] control", and 3d "without [his] fault or negligence". Once these three features are shown to have been present, they constitute a legitimate and *mandatory* ground for an extension. Obviously, this was precisely the situation here.

The machinery breakdowns were clearly "unforeseeable"—and not merely "unknown"—since they did not occur *until after* the contract had been entered into. They were "beyond [the Greenbargs' and Krauss's] control", and certainly not due to their "fault or negligence". Why,

then, should they not constitute a proper cause for extension?

Several cases were cited in the Opinion of the Circuit Court in support of its conclusion but, we respectfully submit, none of them applies.

In *Carnegie Steel Co. v. U. S.*, 240 U. S. 156, the cause assigned (ibid. p. 165) was "*ignorance of the scientific process* necessary for face-hardening 18-inch armor plate". But such ignorance, though not realized at first, was something which actually existed at the very time the contract was made, and *not something which unforeseeably supervened thereafter,* and thus came squarely within the principle invoked by McKenna, J. (ibidem), that "ability to perform a contract is of its very essence * * * and a delay resulting from the *absence of such ability* is not of the same kind enumerated in the contract—is *not a cause extraneous to it and independent of the engagements* and exertions of the parties".

Maxwell v. U. S., 3 Fed. 2d 906, *did not involve the construction of any extension clause at all.* The contractors there simply claimed that the Government itself had caused the delay because the conscription of men for the army, the employment of a large number of men at high wages in the building of a camp nearby, and the assumption of control over transportation, made it difficult for them to carry on their work promptly and expeditiously. This contention was squarely met by the Court, speaking per Rose, J., as follows (ibid. p. 911):

> "The learned and industrious counsel for the defendants have not referred us to a case, nor has our own research discovered any, in which it has been held that where *legislative or administrative measures of*

> *general character, taken under authority of law,* will not change the rights of one who has contracted to do something for a private individual, they will be any more effective because the undertaking has been with the government.
>
> * * *
>
> So far as our research and reflection go, the rule is accurately stated in 39 Cyc. 743, where it is said: 'Contracts with the government, like other contracts, must be performed according to their tenor, both by the contractor and the United States and in general the same acts or omissions which would constitute a breach of contract by an individual, constitute a breach when done or omitted by the government; but the government as a contractor, *cannot be held liable for the public acts of the government as a sovereign and whatever acts the government may do as long as they may be public and general,* cannot be deemed specially to violate the particular contracts into which it enters with individuals.''

Obviously, this case has no bearing whatever on the question here involved.

Equally inapplicable are the four departmental rulings cited by the Circuit Court in their Opinion. Those rulings, it may not be amiss to observe *in limine,* are not authoritative as precedents, and certainly have no controlling, judicial, force. The construction of contracts is *ultimately* for the courts—and the courts alone—and not for executive officers, however highly placed. Moreover, and apart from that, those rulings are clearly distinguishable from the case at bar. They involved pleas of ''difficulty in securing materials'', ''inability to obtain priority ratings'', ''inability to procure the necessary labor'', and ''difficulty due to tire rationing''—in short, a general plea of ''absence

of ability to perform" which, as stated by McKenna, J., in *Carnegie Steel Co. v. U. S.*, supra, was "not a cause *extraneous to, and independent of, the engagements* and exertions of the parties", who by their very contract warranted their *present, general* "ability to perform [as] its very essence".

In the case at bar, however, we have an "unforeseen", *physical accident*—the unexpected breakdown of the machines—which was "beyond [the parties'] control" and "without [their] fault or negligence", and which, having *unexpectedly supervened* after the contract had been entered into, was clearly "extraneous to, and independent of, the engagements" expressed or implied therein. On what possible basis, logical or linguistic, could such a cause be excluded from the operation of Article 17?

Moreover, and assuming—without conceding—that, in spite of what has been said above, it was still optional with the Government officer to grant or withhold the extension, had it been properly and promptly applied for, and that the defendants' effort to seek relief under Article 17 *might or might not* have been successful, it was still their duty to resort to it as an *indispensable prerequisite* to their present claim against the plaintiff under the latter's contract with them.

As pointed out above, the petitioner's liability for the penalties assessed against the respondents is purely contractual, and rests solely upon the theoretical *supposition* that the respondents' contract with the Government "was in direct contemplation", and was thus theoretically incorporated into their own contract as it were, carrying with it an implied promise to make good the respondents' special damages resulting from any breach on petitioner's part. In

other words, the petitioner is supposed to have impliedly said to the respondents: "I am aware of the terms of your contract with the Government, and know the conditions therein imposed upon you, and the risks you run thereunder. I shall stand behind you, and save you harmless from any default on my part in connection therewith." Since, however, Article 17 of that contract provided a possible—assuming it was only a *possible* and not a sure—way out, it would be utterly unreasonable to assume that *that* Article was any less "in the contemplation of the parties" than the other provisions thereof, and that resort thereto had been waived by the plaintiff, as one of the elements so contemplated. The petitioner's assumption of obligation, "conscious" or constructive, was thus necessarily conditioned as much upon the terms embodied in Article 17 as upon the other terms of that contract, and could not be disregarded by the respondents as a mere *brutum fulmen.*

It follows, in view of all the above, that on the basis of any one of the grounds here discussed, the respondents' counter-claim was not sustained by the Record, and that the petitioner was entitled to judgment as a matter of law.

III.

The instruction that the petitioner was liable for the penalties assessed against the respondents because of their delay, even if other and independent causes concurred in effecting, and were sufficient in themselves to effect, such delay was erroneous.

Assuming, without conceding, that it was proper to submit the case to the jury, we respectfully submit, the present judgment would still be untenable because the jury was misinstructed as to the applicable legal principle upon which their verdict was necessarily predicated.

It is obvious that the petitioner could only be required to make good the respondents' losses if—and *only* if—those losses resulted from petitioner's delay; and if, *had it not been for the petitioner's delay,* those losses would not have been incurred by the respondents. For, manifestly, if the respondents could not have performed the conditions of their contract with the Government *at all events,* due to other, independent, causes which were in no way attributable to the plaintiff, and which *in themselves* made such performance impossible, the petitioner's alleged default could not have possible hurt the respondents. This proposition seems so obvious and logical that it may well be regarded as axiomatic:

> "Where two or more *independent* causes concur in producing an effect, and it cannot be determined *which was the efficient and controlling cause,* or whether without the concurrence of both, the event would have happened, and the defendant is responsible for only *one of such causes* (and a fortiori where it appears that *the other cause by itself would have produced the same effect even if the cause attributed to the defendant had not intervened*) no recovery can be had":

17 *C. J.,* p. 740 and authorities ibid.

This principle—that the cause of an injury for which damages may be recovered must be the *exclusive* cause, and not merely one of two totally independent causes—has always been recognized in Pennsylvania as a self-evident proposition, and as implied in the maxim: "causa proxima non remota spectatur". Said Agnew, J., in

McGrew v. Stone, 53 Pa. 436 (1866) p. 442:

> "In Beach v. Parmeter, 11 Harris 196, the present Chief justice remarking upon an injury by collision,

said that 'for inevitable accidents, and for such as result from mutual negligence of parties, the law gives no redress; but when the injury comes from the *exclusive* negligence of one party, he cannot shield himself from liability by calling it an accident'. The maxim causa proxima non remota spectatur means but this. We are not to link together as cause and effect, events having no probable connection in the mind, and which could not by prudent circumspection and ordinary thoughtfulness be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury, but we are not justly called to suffer for it *unless the other event was the effect of our act,* or were within the probable range of ordinary circumspection when engaged in the act."

Nor is this principle confined to actions ex delicto. It has been specifically applied to suits for delay in actions ex contractu. The default of the defendant must be the *sole* cause of the damage to warrant recovery. Thus in

Caldwell & Drake v. Schmulbach, 175 Fed. 429 (1909),

Dayton, J., said (ibid. p. 434):

"The principles here established have no application to cases where, under such contracts for *liquidated damages for delays, such delays have arisen* from (a) the fault of the owner; or (b) that of his agents and independent contractors; or (c) *by the joint and mutual default of owner and contractor.* Such cases must be governed, I conceive, by the rulings in such cases as Jefferson Hotel Co. v. Brumbaugh (C. C. A., 4th Ct.) 168 Fed. 867; Vilter Mfg. Co. v. Tygart's Valley Brewing Co. (C. C.) 168 Fed. 1002; Stewart v. Keteltas, 36 N. Y. 388; Heckmann v. Pinkney, 81 N. Y. 211; Weeks

v. Little, 89 N. Y. 566; Lilly v. Person, 168 Pa. 219, 32 Atl. 23; Focht v. Rosenbaum, 176 Pa. 14, 34 Atl. 1001; Wilkens v. Wilkerson (Tex. Civ. App.) 41 S. W. 178. In the Jefferson Hotel Case, supra, the Circuit Court of Appeals for this circuit fully considered this very question, and determined that the courts would not undertake to 'apportion' the damages occasioned by mutual delays and I think very clearly set forth some of the pertinent reasons why it would not do so. In this case there can be no question that the delays were the result of mutual default. * * * Under *such* circumstances, I am clearly of the opinion that this case, like the Jefferson Hotel one, presents a very striking example of how impossible it would be for a court *to attempt to determine and apportion the cause of delay between the owner and contractor, both of whom are in default.* But it is insisted that the contract itself here provides in express terms for such apportionment of delay, and in this particular differs from the terms of the one in the Jefferson Hotel Case. It seems to me that this cannot change the situation. The law is that courts by reason of the very uncertainty, the impossibility to fairly and justly determine the causes of such *mutual delays and their effects will not attempt to apportion.* This being true, no private contract by its terms can change the law or compel them so to do. *For these reasons the defendant's claim for $29,150 damages for delays must be wholly disallowed.''*

This ruling, it may be well to note, was invoked and approved by Gray, J., in

Mosler Safe Co. v. Maiden Lane etc. Co., 199 N. Y. 479 (1910), p. 487,

which, in its turn, was cited with approval by this Court in

U. S. v. United Engineering Co., 234 U. S. 236 (1914) p. 243;

and finds strong confirmation in the following language of Brandeis, J., in

Robinson v. U. S., 261 U. S. 486 (1923).

Said he (ibid. pp. 488-9):

> "If it had appeared that the first sixty-one days' delay had been due *wholly* to the contractor's fault, and the government had caused the last sixty days' delay, there could hardly be a contention that the provision for liquidated damages should not apply. Here the fault of the respective parties was not so clearly distributed in time; and it may have been difficult to determine, as a matter of fact, how much of the delay was attributable to each. *But the court of claims has done so in this case.* Its findings are specific and conclusive."

The use of the word "wholly" in the above excerpt, we respectfully submit, is quite significant, and clearly indicates its essential attribute as a necessary element of recovery.

The same proposition is stated thus in *17 C. J.*, p. 963:

> "It is obvious that the party seeking to enforce such a provision (for liquidated damages) *must not be himself in default.*"

The learned trial Judge, however, charged just to the contrary. Said he (pp. 343a-344a):

> "If he did know it, then we go on to the next proposition, and that is this: Did Krauss's default actually cause Greenbarg to default in his contract to the Government? That is the second question. *It does not have to be the sole cause. It may be that there were other causes,* but the question may be put in this way: Was the penalty incurred by Greenbarg under his contract with the Government directly and naturally re-

sulting in the ordinary course of events from Krauss's failure to deliver the webbing in accordance with his contract? That is what you must ask yourselves.

Obviously, you can see that there is a limit to which the thing could go. If Greenbarg never owned a plant, for instance, if he never had a possibility of performing his contract with the Government at all, then no one could say that Krauss's failure to deliver the webbing on time was what caused the loss, but it *may be that there were other causes which would not entirely defeat Greenbarg's claim.* Let me put it this way: If the primary effective cause of Greenbarg's default was Krauss's failure to deliver on time, then the penalty directly and naturally resulted, in the ordinary course of events, from Krauss's failure to deliver the webbing. You must find whether that is so or not."

He later reiterated this instruction with even greater emphasis in his colloquy with the jury (pp. 359a-360a):

"Assuming that the removal of the factory did delay him to some extent, that would not necessarily prevent him from recovering in this case, just because it contributed in some way. If you believe, after all is said and done—assuming that *there may have been some delay caused by the removal—he says there wasn't, he says that statement is not true—but assuming that statement is true and assuming there was some delay caused by the removal of the factory, some delay caused by the eyelets, nevertheless if you are satisfied that the primary cause, the real cause of his failure to complete the contract on time was the subcontractor's delay, then these other things would not prevent his recovery.* * * *

I didn't mean to tell you—I want to make this clear—I didn't mean to tell you that the delay by rea-

son of Krauss's default had to be the *sole* cause of Greenbarg's incurring his penalty. *It doesn't have to be the sole cause, it has to be the main cause, primary cause, chief cause. It has to be sufficient in itself to have delayed his contract with the Government. There may have been some other causes that contributed, but unless you believe that they were so serious that they alone would have caused all this penalty, I don't see why you should not consider the Krauss delay as the principal cause.*"

This instruction, we respectfully submit, was clearly erroneous and contrary to the settled law on this point. Nor was it a mere harmless error. It vitally affected the case since the Record discloses ample evidence that the default, at the very worst, was "joint and mutual", and not "wholly" or exclusively that of the petitioner alone. This evidence, briefly stated, was as follows:

1. *Even such webbing as was actually delivered by the petitioner was not made up promptly into leggings, and the respondents' delay far exceeded that chargeable to the petitioner.*

This is clearly indicated in the following table, and is borne out by the testimony of Hugo R. Breiden, a certified public accountant, based upon the defendants' own records (pp. 163a-171a):

Delivery dates stipulated by the U. S. contract less 4 work days required to work the webbing into leggings	No. of pairs of leggings required to be delivered under the U. S. contract, cumulated	Pairs of leggings which could have been manufactured from the webbing actually delivered by the plaintiff	Pairs of leggings actually manufactured by the defendants, cumulated	The defendants' default in excess of the plaintiff's
9/4/40	34,900	25,626	22,205	3,421
9/24/40	174,500	146,036	109,105	36,931
10/23/40	453,700	386,780	258,105	128,675
11/13/40	698,000	517,024	422,105	94,919

2. *The respondents, in their equity suit against the landlord, specifically charged under oath that they were delayed in the performance of their contract with the Government by the landlord's distress and eviction.*

Their Bill averred inter alia:

"16. The plaintiffs aver that although they have paid or tendered their rent in advance in accordance with the terms of the lease, the defendants have wilfully, wantonly and unlawfully *prevented and enjoined the plaintiffs from using the said premises in that they have removed the locks upon the doors and substituted their own locks* so that the plaintiffs have been unable to enter the said premises.

17. The plaintiffs aver that the injury growing out of the facts is *very serious and the damage irreparable in that they are being delayed in the execution of government defense work and are subjecting themselves to a penalty for such delay.*" (p. 278a.)

3. *In their letter to the Government, on September 27, 1940, the respondents unequivocally declared that they were delayed by the removal of their plant.*

The letter read:

"September 27, 1940

Commanding Officer
Phila. Q. M. Depot,
21st & Johnson Sts.,
Phila., Pa.

Dear Sir:

Due to an *interruption in manufacture* of Leggings, Canvas, under Contract W 669 qm-8350, and consequent temporary *delay in deliveries caused by the removal to new factory* at H. & Westmoreland Sts., Phila., Pa., and of the desire to complete the contract

on time, permission is requested to have 100,000 prs. Leggings under this Contract, manufactured at the plant of Keystone Coat & Apron Co., 315-323 No. 12th St., Phila., Pa., at which place it is proposed to have all cutting, sewing operations, and shipping performed.

The Leggings are to be invoiced by the King Kard Overall Co.

This request is made with the understanding that any additional cost that may be occasioned the Government thereby, will be assumed and borne by us.

Very truly yours,

KING KARD OVERALL CO."*

(p. 300a.)

4. *The respondents did not have enough eyelets to complete the leggings in time.*

This appears from the following colloquy between the learned trial Judge and the defendant, Greenbarg, while on the witness stand (pp. 270a-271a):

"By THE COURT:

Q. This is what we want you to explain. Apparently there were enough eyelets *still overdue on the 17th of November to amount to 100,000 pairs of leggings out of a total contract of about 700,000.* And now, will you explain about that?

A. Your Honor, I can explain it from a manufacturing point of view in this respect: We had formerly made leggings, and I am not positive whether—we

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* The defendant, Benjamin Greenbarg, when confronted with the bill in equity (pp. 82a-83a) and the letter to the Government (pp. 122a-123a), asserted that the statements therein contained *were false,* and did not reflect the actual truth. The jury, however, *were manifestly not bound to accept this extraordinary and self-incriminating explanation of the defendant.*

had a good many million eyelets laying around that originally came in from the Peerless on the former contract that were a little too hard and we were going to exchange them whether we used them on that contract or not. And another way was that we had these large quantities of leggings on hand, and we could hold back deliveries by telephoning, because if we would have to buy supplies, it would amount to over a quarter million dollars supplies, and if we couldn't ship the leggings, and we could get the brass by a telephone call, probably the next day, there would be no necessity of having so much material on hand.

Q. I see. Well, *that is an explanation. That is to be considered. In other words, as I understand it, you had no particular reason to speed up the eyelets as long as you couldn't get the webbing?*

A. *That is correct.*"

Obviously, the jury may well have refused to accept that "explanation", and may have found as a fact that the shortage in the eyelets was an efficient cause, or one of the efficient independent causes, of the defendants' delayed deliveries, and thus—*had they been correctly instructed as to the applicable law*—would have declined to impose the penalties upon the plaintiff.

5. *Even after the petitioner had delivered all the webbing under his contract, the respondents remained in default for two months thereafter, and did not complete their deliveries until February 18, 1941.*

The final delivery by the petitioner of the balance of webbing due under his contract was on December 14, 1940 (vide defendants' Exhibit 1, p. 300b), while the respondents did not complete their deliveries to the Government until February 18, 1941 (vide Exhibit D 12, facing p. 332a).

This in itself might have led the jury to conclude that the respondents' default was largely due to independent causes which intervened, and ran concurrently with the cause attributable to the plaintiff, and to accordingly return a verdict in the latter's favor, had *they been properly instructed on the law applicable to concurrent causes.* Indeed, the Record clearly shows that, as a result of the evidence thus adduced, the jury not only *might* have found the presence of independent and concurrent causes, but that *they actually did so find* and fully indicated it in their colloquies with the learned trial Judge; and that, had it not been for the erroneous instruction here complained of, the present verdict would never have been rendered. These colloquies are herein reproduced in extenso for the convenience of this Court (pp. 357a-370a):

> "(The jury returned to the courtroom.)
>
> THE COURT: Members of the jury: I would like to inquire whether you think there is any reasonable prospect of your arriving at an agreement in this case. I will ask the forelady.
>
> JUROR NO. 1: *Your Honor, we are equally divided in our opinion, we are six on one side and six on the other. We just can't seem to get any further.*
>
> THE COURT: I don't want to keep you here all night. It is too bad. The case has taken three days to try.
>
> JUROR NO. 1: We are very sorry.
>
> THE COURT: I know. It is nobody's fault. Is there anything I can do to assist in any way? Any further instructions I could give that might help? Any of you may ask a question, if you have any.
>
> JUROR NO. 1: *We were just deciding about the contributory causes for the penalty.*

JUROR No. 6: Would you explain this letter to the jury?

THE COURT: All right. I have been handed this Exhibit P-4, which is Mr. Greenbarg's letter of September 27. In that letter he asks the Government to be permitted to sub-let 100,000 pairs of leggings under this contract, and he says the reason why he does it—why he is asking for that—is that it is due to an interruption in the manufacture of leggings, canvas under this contract, and consequent temporary delay, the delay being caused by his removing to a new factory located on Westmoreland Street.

He is undoubtedly in that letter telling the Government that he is being delayed by the removal of his factory. He does not mention any other cause. He says he is being delayed. That is early in the course of the contract. It is September 27. He still, at that time, had pretty nearly two months to complete the contract, but he says there that the reason he is being delayed is the removal of his factory.

You will remember that on the stand Mr. Greenbarg, as I recall, practically admitted that that was a false statement. He said it was not the truth. He said the reason why he put it that way was that the Government would not have given him any consideration if he had given what he said was the real reason, namely the delay of a subcontractor, and they would not have allowed him to sublet merely because one of his subcontractors was delayed. So, in order to get permission, he says he had to give some other reason. I must say his admission seemed to me very clear. *He was giving a false reason to the Government for it.* That is his explanation.

I don't think, however, even if you take it just as I have put it, I don't think that necessarily is an admission that the removal was either the *sole or the principal cause of delay.* I don't read that as—in other

words—put it this way—taking it at its worst, *I don't look on it as destroying his case.* It does not necessarily mean that the *only cause* for delay was the removal.

Assuming that the removal of the factory did delay him to some extent, that would not necessarily prevent him from recovering in this case, just because it contributed in some way. If you believe, after all is said and done—assuming that *there may have been some delay caused by the removal—he says there wasn't, he says that statement is not true—but assuming that statement is true and assuming there was some delay caused by the removal of the factory, some delay caused by the eyelets, nevertheless if you are satisfied that the primary cause, the real cause of his failure to complete the contract on time was the subcontractor's delay, then these other things would not prevent his recovery.*

That paper does amount to an admission that there *are some other causes* operating besides the Krauss delays, but it does not say *to what extent they are, or how much delay they are causing or how serious it is, and I don't feel that merely because there was some delay caused by some other things, it necessarily puts his case out of court.*

Does that help you at all? Is that of any value to you?

I didn't mean to tell you—I want to make this clear—I didn't mean to tell you that the delay by reason of Krauss's default had to be the sole cause of Greenbarg's incurring his penalty. *It doesn't have to be the sole cause, it has to be the main cause, primary cause, chief cause. It has to be sufficient in itself to have delayed his contract with the Government. There may have been some other causes that contributed, but unless you believe that they were so serious that they alone would have caused all this penalty, I don't see*

why you should not consider the Krauss delay as the principal cause.

I would be glad to have you talk that over a little further, if you can. I do hope you can get together. It is just a sheer waste of time to have spent three days on this thing. I do realize you are acting in good faith and trying in the best way to get together. It is perfectly proper for you to listen to reason and change your mind, if you are convinced there is good reason on the other side of the situation that is reasonable to you. There is no reason why you should not change your mind, if you really think it is proper to do so.

I think it is worth while perhaps trying a little longer and see if you can get together.

Would there be any other questions you would like to have me answer?

JUROR No. 1: Your Honor, do you recall when they started operating the new plant? Could you tell us that, please?

THE COURT: When they moved?

JUROR No. 1: When they started operating.

THE COURT: I think Mr. Miller can give us that date. I haven't my notes here.

Have you any objection if I ask Mr. Greenbarg when they actually moved?

MR. MILLER: I think the lease says they began on September 27.

THE COURT: Well, I guess it does.

MR. GREENBARG: While that place was rented, the lease is dated September 22.

THE COURT: All I want to know is what time did you actually start working?

MR. GREENBARG: We started in the fall, September 21.

THE COURT: Were you working full time in your new plant?

MR. GREENBARG: Very early in August.

THE COURT: Were you working full time?

MR. GREENBARG: Full time, as soon as we got the material in there.

THE COURT: That's all. He says before the first of September. I don't remember whether I have the exact date on it or not. I don't believe I have. I do have something on my notes about it. The testimony was that 'we moved part of the plant in early August to "H" and Westmoreland Street, and after we moved we built up the capacity to 15,000 pair. That was sometime during September.'

That is the testimony as it was at the trial.

JUROR No. 1: Can any member of the jury ask a question?

THE COURT: Surely. I want to help you any way I can.

JUROR No. 10: How about the delay in the deliveries of the canvas sent to the Government? He stated there was a shortage of canvas.

THE COURT: It is hard to say just what that means. It says, 'Due to an interruption in the manufacture of leggings, canvas'—I think he simply means—I don't think he means the receipt of canvas by that letter. It is for you to say what the letter means.

If you ask me, I think all he is referring to here is consequent temporary delay in deliveries *caused by removal of his factory;* all he means—he is just identifying the contract. He says, 'Due to an interruption in manufacture of Leggings, Canvas, under Contract W 669 qm-8350'—he is just describing the contract. I don't think he means to say—he is not putting deliv-

eries of canvas in this as a reason—he says, 'Due to interruption in manufacture of Leggings, Canvas, under the contract.' That is what it means. 'Canvas leggings under Contract 8350. Consequent temporary delay in deliveries caused by removal of my factory.' That's the only reason he means there. I am pretty sure of that.

JUROR No. 10: Thank you.

JUROR No. 1: Do you have a question? Anybody else?

JUROR No. 5: *I was very much impressed by the testimony of the accountant that webbing was on hand.*

THE COURT: That's all right.

JUROR No. 5: *Although sufficient number of leggings had not been delivered to the Government to use his material. The rebuttal made by the defendant did not convince me to the contrary. There were many contributing causes, it seems to me.*

THE COURT: It is quite possible. I think you might have misunderstood my charge—what I wanted to say was the mere fact that there *were other contributing causes would not put his case out of court. If the principal cause, the main cause, was the failure to get the webbing, the fact that there were other contributing causes would not in my judgment be sufficient to put him out of court.*

JUROR No. 5: No, but *would that justify us in putting all the penalty on one person?*

THE COURT: *Yes, indeed.* I think if you have decided the principal cause, the real cause of the delay was the failure of Mr. Krauss to deliver the webbing—if you decide that was the real cause and *the serious cause*—then I think you would be entirely justified in putting it *entirely* upon him.

JUROR No. 5: If we could not agree on that, how could we?

THE COURT: Well, that's the primary question you must agree upon.

MR. MILLER: *This entire proceeding, I take it, is somewhat unusual, after five hours of deliberation. May I, with the most respectful deference, ask an exception to your Honor's additional charge?*

THE COURT: Yes, take all the exceptions you want, but I am going to try to help this jury to try to come to a verdict somehow.

MR. MILLER: May I say one thing——

THE COURT: I don't think you can address the jury. If you have anything you want me to say to them, I will listen to you.

MR. MILLER: Yes. I want to say to you in my humble judgment the eyelets, many millions of them——

THE COURT: They haven't even asked about that.

MR. MILLER: It is on the question of contributing causes and what is the dominant factor. They may have been——

THE COURT: If you want me to say anything to the jury, you can ask me to do it. You cannot make an argument to the jury. Counsel's arguments are closed long ago. If you have something that you want me to say, I will hear it.

MR. MILLER: *Will you be so good as to charge the jury on the question of millions of eyelets that came in after November 18?*

THE COURT: What do you want me to say to them?

MR. MILLER: That they hadn't on hand sufficient eyelets.

THE COURT: I have to charge them on matters of law. Do you want me to say, as a matter of law, that that was the main cause of the delay?

MR. MILLER: No, sir. Which was the main cause is for the jury and not——

THE COURT: Certainly it is.

MR. MILLER: And not for either counsel or for the Court. Because that is for them, and what the contributing factors were.

THE COURT: That is what I have been telling them. You must decide what is the principal cause; but I do want to say *the mere fact that there were other contributing causes would not in my judgment mean you would have to find a verdict for the plaintiff;* you could find a verdict for Mr. Greenbarg even though there were *other causes that would have made for some delay even if the webbing would have been on time.*

JUROR No. 1: Any other questions from the jury?

THE COURT: I think you might try it a little bit longer, and then report to me.

JUROR No. 1: Just bear with us a little while longer.

THE COURT: Yes, I will. I will wait for you.

(The jury retired.)

Later Colloquy at Rendition of Verdict.

(The jury returned to the court room.)

MR. LILLY: Members of the jury, have you agreed upon a verdict?

JUROR No. 1: Yes, we have.

MR. LILLY: In the issue joined in this case between Max Krauss, trading as American Cord & Webbing Company, and Benjamin Greenbarg and Joseph Greenbarg, trading as King Kard Overall Company, how

say you, do you find for the plaintiff or for the defendant?

JUROR No. 1: We have decided in favor of the defendant.

MR. LILLY: How do you assess the damages?

THE COURT: You have that calculation.

JUROR No. 1: It is all in the evidence.

MR. MILLER: I should like to poll the jury.

THE COURT: Let us get the verdict first. $7,414.86. Is that correct?

JUROR No. 1: Yes.

MR. LILLY: Members of the jury, harken unto your verdict as the Court hath recorded it, in the issue joined in this case between Max Krauss, trading as American Cord & Webbing Company, and Benjamin Greenbarg and Joseph Greenbarg, trading as King Kard Overall Company, defendant, you say you find in favor of the defendant and assess the damages at $7,414.86, and in answer to question No. 1:

> 'Did Kraus, at the time he made his contract with Greenbarg, know that Greenbarg's contract with the Government provided that Greenbarg's failure to deliver on time would subject him to a penalty?' Your answer to that is 'Yes.'
>
> '2. If the answer to the preceding question is "Yes," did Krauss know approximately the amount and provisions of the penalty clause?' Your answer to that is 'No.'
>
> '3. Was the penalty incurred by Greenbarg under his contract with the Government loss directly and naturally resulting in the ordinary course of events from Kraus' failure to deliver the webbing in accordance with his contract?'

Your answer to that is 'Yes,' and so say you all.

THE JURY: Yes.

MR. LILLY: Did you say you wanted the jury polled?

MR. MILLER: One of the jurors said in my hearing, 'This is a false verdict; I don't agree.'

JUROR No. 5: Pardon me. *I said 'forced.' I* said *we had to come to an agreement.* I didn't say 'false.'

MR. MILLER: Did you say you did not agree?

JUROR No. 5: *My decision had been for the plaintiff.*

MR. MILLER: She said it was a forced agreement.

JUROR No. 5: I mean, we had to come to some agreement, we couldn't stay all night and we couldn't split the penalty; *what could we do?*

MR. MILLER: I would like the record to show that.

THE COURT: Surely.

JUROR No. 5: I can't hold them up all night.

MR. MILLER: I should like Juror No. 5 to make her statement for the record.

THE COURT: Juror No. 5, do you agree to the verdict as rendered?

JUROR No. 6: If your Honor please, this case wasn't on trial half an hour on Monday morning when she decided that her mind was made up.

THE COURT: I can't go into that.

JUROR No. 5: That was 3:00 o'clock Monday afternoon.

THE COURT: I must ask Juror No. 5 whether she agrees to the verdict.

JUROR No. 5: *Judge, I understood the charge to be, before—the last time we were down—that we should*

bring in that verdict, therefore, I do agree to it in that respect.

THE COURT: I didn't say that. I think you got a mistaken notion of my charge. It is up to you to say if you don't agree to the verdict. It is not necessary for you to say you agree if you don't.

MR. MILLER: May I say to Juror No. 5 if she does not agree to the verdict, she can still say whatever she pleases. It requires the unanimous decision of all twelve for a verdict.

THE COURT: I think Juror No. 5 will take what I say rather than what counsel says on that. All I want to know is whether you agree to that verdict or whether you don't.

JUROR NO. 5: *What else can I do?*

THE COURT: I am not answering questions. If you agree to the verdict, say so; if you don't agree to it, say you don't, and I will have to send you back to deliberate further.

JUROR NO. 5: Must I answer?

THE COURT: Surely; I am asking you.

JUROR NO. 5: *Yes. From hearing the testimony it seemed to convince me otherwise, conscientiously—not only me but five others—but we decided after your last charge that although these contributing causes did not seem to be the only things, yet that did not throw the defendants' case out.*

THE COURT: May I ask, then, whether you do agree to the verdict as the clerk took it?

JUROR NO. 5: I am a poor juror, Judge.

THE COURT: I must have an answer to the question. We can't stand here.

JUROR NO. 5: Well, of course, I will agree. I am so unfamiliar with the law. I shall have to agree.

THE COURT: Do you want to have the jury polled further, Mr. Miller?

MR. MILLER: I should like to know——

THE COURT: There is no objection if you want to poll the jury; it is your right.

MR. MILLER: *I should like to know which other jurors besides Juror No. 5 felt so impelled by your Honor.*

THE COURT: That is a very improper question. No other juror has said anything about it.

MR. MILLER: I will withdraw that.

THE COURT: You can poll each individual juror. That is your right. That is all I will permit you to do, if you want the jury polled, Mr. Miller. No other juror has said anything about this.

MR. MILLER: I don't mean to be disrespectful.

THE COURT: It is your right to poll the jury, and it is quite proper."

The conviction thus evinced by the jury that there were other efficient causes—in no way attributable to the petitioner—which were in themselves sufficient to prevent the respondents from delivering their leggings in accordance with their contract, and had thus concurred in bringing about an indeterminate part—if not all— of the penalties imposed upon them, may thus account not only for the jury's desire to apportion the damages, but also for their *reluctance* to give an affirmative answer to the 3d interrogatory submitted to them (p. 367a):

"3. Was the penalty incurred by Greenbarg under his contract with the Government loss directly and naturally resulting in the ordinary course of events from Krauss' failure to deliver the webbing in accordance with his contract?"

The photostatic copy—attached at the end of this brief —of the original paper which was submitted to the jury, and upon which they recorded their answer, shows that the answer was originally "No", but that it was later changed to "Yes"—a change which obviously must have been brought about by what—we respectfully contend—was an erroneous instruction, to the effect that,—

> "It [Krauss's default] *doesn't have* to be the *sole* cause, it has to be the main cause, primary cause, chief cause. It has to be sufficient in itself to have delayed his contract with the Government. *There may have been some other causes* that contributed, but *unless* you believe that they were so serious that they *alone* would have caused *all* this penalty, *I don't see why you should not consider the Krauss delay as the principal cause.*" (p. 360a).

In the face of this instruction, the jury, which was of course *bound to take the law from the trial Judge,* manifestly had no alternative but to change their answer to the third interrogatory from "No" to "Yes", and to mold their verdict accordingly in spite of their personal judgment to the contrary—a thought frankly voiced by Juror No. 5 in open Court (p. 370a):

> "Well, of course, I will agree. I am so unfamiliar with the law. *I shall have to agree.*"

In sustaining the recovery, the Circuit Court said:

> "It is contended that in order to charge the penalty to the webbing company, its failure to deliver on time had to be the sole cause of the damage claimed.
>
> We think the trial judge's charge was not open to attack by the appellant. One of the legal tests which must be met in order for something which is a cause in fact to be a 'legal cause' is that it shall have been a

substantial factor in bringing about the harm. As thus used substantial denotes 'the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, . . .'. If a number of factors are operating one may *so predominate* in bringing about the harm as to make the effect produced by others so negligible that they cannot be considered substantial factors and hence legal causes of the harm produced. In that event liability attaches, the requisites of legal cause being shown, only to the one responsible for the predominating, or substantial, factor producing the harm".

This proposition, *where properly applicable,* is undoubtedly a correct statement of the law. It is expressed as follows in 17 C. J. p. 740:

> "Where, however, the act or omission complained of *predominates* over the influence of other concurring causes, it will in general be held to be the proximate cause";

and simply means (as clearly shown by the illustrations and authorities cited in footnotes 72 and 73 ibidem) that where several causes combine together, and the *combination* thus resulting produces an injury, the party responsible for the cause which is the predominating factor *in the combination,* and is thus the *principal factor* in producing the injury, is liable therefor. What possible application, however, can this have to such delays of the Greenbargs—and the penalties *assessed for such delays*—as were caused by the distress and eviction, the removal of the plant, lack of eyelets, etc.? As to *such delays,* manifestly, Krauss's tardiness was not only no predominating or principal factor, but *no factor at all.* For, obviously, no person could be charged with having delayed one in the performance of

that part of his obligation which he was unable to perform at any rate, and which therefore, *to that extent,* cannot possibly be attributed to the former no matter how serious and inexcusable his default may be.

To put the matter more concretely: The penalty here involved was not assessed *in solido* but *on a unit basis,*—two-fifths of 1% of the price of each pair for each day's delay. Let us assume for the sake of illustration that out of the entire delayed output, which entailed a total penalty of over $20,000.00, 100,000 pairs were delayed for 25 days by the distress, removal, lack of eyelets, etc.—so that the Greenbargs *could not have avoided such delay* even if they had then all the webbing in the world—for which they were penalized under the terms of their contract $6199.00. Could Krauss be liable for *that* amount on the theory that his tardiness was the *predominating* or *principal* cause of the $20,000.00 penalty, because the *bulk thereof*—some $14,000.00—was attributable to him, and hence he must pay all of it? Yet, this was precisely the instruction given to the jury:

> "There may have been some other causes that contributed, but *unless* you *believe* that they were so serious that they *alone* would have caused *all this* penalty, I don't see why you should not consider the Krauss delay as the principal cause." (R. p. 360a.)

Manifestly, the burden was upon the Greenbargs, before they could charge Krauss with a single dollar of penalty, to show that that dollar's worth of delay was due entirely to the absence of the webbing and that, *had the webbing been there, no such delay would have happened,* since if that delay would have happened anyway because of the other causes present, the want of webbing, as stated

above, was no factor at all, as far as that dollar penalty was concerned.

It is true, as pointed out in footnote 2 of the Opinion of the Circuit Court, "the jury specifically found that the penalty incurred by the manufacturer was a loss directly and naturally resulting, *as above defined by the trial Judge,* from the webbing company's failure to deliver on time." This finding, however, as shown above was predicated upon the erroneous instruction of the learned trial Judge that "unless [the other causes] were so serious that *they alone* would have caused *all this* penalty", the concurrent absence of webbing must be legally regarded as *the* cause of the loss incurred by the Greenbargs; and therefore cannot possibly stand, if that instruction is—as it ought to be—rejected.

IV.

A certiorari ought to be granted in this case to bring it up for review.

The petitioner respectfully submits that this case presents a situation which merits the awarding of a certiorari and a review by this Court because, as pointed out in the accompanying petition:

> 1. The question of liability for special damages is one of great public importance and is bound to arise from time to time; and the decision of the Circuit Court of Appeals as to the law of Pennsylvania relating thereto is in conflict with the applicable Pennsylvania decisions. Moreover, that decision would introduce an inter-jurisdictional conflict into the domain of commercial law where uniformity has always been regarded as essential and highly desirable.

2. The said decision of the Circuit Court of Appeals construing and limiting the scope of Article 17 of the Government contract so as to exclude therefrom delays resulting from accidental and unanticipated machinery breakdowns, embraces an important question of federal law—since that Article, in its present form, is now generally included as a standard provision in practically all Government contracts of this character throughout the country involving hundreds of millions of dollars—which, the petitioner believes, has not, but should be, settled by this Court.

3. The said decision of the Circuit Court of Appeals that where, apart from the vendor's default, other, independent, causes in no way attributable to him, made it impossible for his vendee to make a number of his deliveries on time, the vendor is nevertheless liable for all of the penalty incurred by the vendee as a result thereof, is in conflict with the decisions of the Circuit Court of Appeals of the 4th Circuit.

The petitioner therefore respectfully submits that, for the three reasons aforestated, this Court, in the exercise of its judicial discretion, ought to award a certiorari as prayed for, so that the said decision of the Circuit Court of Appeals may be reviewed, and the legal questions therein involved definitely and finally settled.

Respectfully submitted,

B. D. Oliensis,
Attorney for Petitioner.

1. Did Kraus, at the time he made his contract with Greenbarg, know that Greenbarg's contract with the Government provided that Greenbarg's failure to deliver on time would subject him to a penalty?

Answer Yes or No. Yes

2. If the answer to the preceeding question is "Yes," did Kraus know approximately the amount and provisions of the penalty clause?

Answer Yes or No. No

3. Was the penalty incurred by Greenbarg under his contract with the Government lost directly and naturally resulting in the ordinary course of events from Kraus's failure to deliver the webbing in accordance with his contract?

Answer Yes or No. ~~No~~ Yes

We find a verdict for the Defendant
(plaintiff or defendant)